LIBRARY
SUPREME COURT, U. S.

FILED
APR 2 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1285

ROBERT LYNN MARTIN and MAURICE DANIEL DODSON,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION

For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

MORRIS A. SHENKER,
JOHN L. BOEGER,
408 Olive Street,
St. Louis, Missouri 63102,
Attorneys for Petitioner,
Maurice Daniel Dodson.

EDWARD BENNETT WILLIAMS,
ROBERT L. WEINBERG,
1000 Hill Building,
Washington, D. C. 20006,
Attorneys for Petitioner,
Robert Lynn Martin.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Prayer	1
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	12
Appendix A—Opinion of the United States Court of Appeals for the Fifth Circuit	A-1
Appendix B—Order denying petition for rehearing	A-10
Appendix C—Judgment	A-12

Cases Cited.

Alberto Castilleja v. Severa Camero, 10 Tex. Sup. Ct. J. 340 (1967)	9, 10, 11
Champion v. Ames, 188 U. S. 321 (1903) (Lottery case)	7
Clark Distilling Co. v. Western Md. R. Co., 242 U. S. 311, 331 (1917)	7, 11
In re Rahrer, 140 U. S. 545, 561 (1891)	7
Jacob v. Hyman, 5 Cir., 286 Fed. 346 (1923)	10
Leisy v. Hardin, 135 U. S. 100 (1890)	7
Marchetti v. United States, 88 S. Ct. 697 (1968)	7
United States v. Constantine, 296 U. S. 287, affirming 75 F. 2d 928 (5 Cir.)	11

United States v. Fabrizio, 385 U. S. 263 (1966) ...4, 6, 7
United States v. Frankfort Distilleries, Inc., 324 U. S. 293 (1945) 8, 11
United States v. Kahriger, 345 U. S. 22 (1953) 7

Statutes Cited.

18 U. S. C., § 1084 (a) (b) 2, 3, 4, 5, 6
28 U. S. C., § 1254 (1) 2
Tex. Rev. Civ. Stat. Ann., Art. 646 (1952) 3
Texas Stat. Ann., Title II, Art. 646 9

Reports Cited.

H. Rep. No. 967, 87th Cong., 1st Sess., p. 2 6
S. Rep. No. 588, 87th Cong., 1st Sess., p. 2 6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. .....

ROBERT LYNN MARTIN and MAURICE DANIEL DODSON,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION

For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on January 25, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals is not reported at the time of the printing of this petition. Said opinion is printed as Appendix A, *infra*. The opinion of the Court of Appeals denying the petitions for rehearing, but modifying its original opinion is printed herein as Appendix B, *infra*.

JURISDICTION.

The judgments of the Court of Appeals (Appendix C, *infra*) were entered on January 25, 1968. Timely petitions for rehearing were denied on March 5, 1968 (Appendix B,

infra). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

I. Whether Congress has the power under the Commerce clause to prohibit all interstate transmission of wagers, by means of non-governmental facilities, regardless of the lawfulness of the wager in the States where transmitted and received.

II. Whether Congress has acted validly in making it a federal felony to transmit by wire a wager on a sporting event from Texas to Nevada, where acceptance of the wager comports with Nevada law and transmission of such wager from Texas to Nevada is either (a) not in violation of Texas law or (b) at most, an offense punishable by a fine of Five Dollars ($5.00) to One Hundred Dollars ($100.00) under Texas law.

STATUTES INVOLVED.

18 U. S. C., § 1084 (a) (b):

> **"Transmission of wagering information; penalties.**
>
> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> (b) Nothing in this Section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of

sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

Tex. Rev. Civ. Stat. Ann. Art. 646 (1952):

"No person in this State shall enter into an agreement with another, either orally, written or implied, whereby either one or both shall bet or wager money or anything of value, or otherwise become a party to any gambling scheme based upon the final result or outcome of any play or portion thereof of a game of baseball or football."

STATEMENT.

Petitioners were convicted in the United States District Court for the Southern District of Texas, Houston Division, on May 26, 1966 of violating 18 U. S. C., Section 1084 (R. 107-109).[1]

Each petitioner received a two year suspended sentence of imprisonment, but was placed on five years probation and fined Ten Thousand Dollars ($10,000.00) (R. 8, 108).

The charge against petitioners was the transmission of wagers and wagering information by telephone between Houston, Texas and Las Vegas, Nevada (R. 10-16). In pre-trial motions, petitioners unsuccessfully challenged the constitutionality of 18 U. S. C., Section 1084, as applied to the circumstances of this case (R. 4, 5, 17, 24). The trial Court permitted the defense to admit the facts charged while preserving for appeal the constitutional issues raised (R. 102-107). Petitioners waived trial by jury and stipulated with the government that the factual allegations of Count III of the indictment were true (R.

[1] The citation "R." refers to the certified record filed in this Court.

99-107).[2] It was also stipulated by the parties that all of the telephone calls upon which the count was predicated were made from Houston **to** Las Vegas (R. 106). Following conviction upon the stipulated record, petitioners unsuccessfully moved for entry of judgment of acquittal on the ground that the conduct alleged did not constitute an offense against the United States, because 18 U. S. C., Section 1084, could not be applied to wagers and wagering information transmitted **into** Nevada without infringing upon the powers reserved to Nevada by the Tenth Amendment to the United States Constitution (R. 109-113).

The Fifth Circuit Court of Appeals granted petitioner Martin's motion to hold the appeal in abeyance pending this Court's decision upon his petition for certiorari, which was sought prior to judgment in the Court of Appeals. Martin's petition of certiorari urged that certiorari be granted for the reason that his sole point of appeal turned upon a constitutional issue then before this Court in **United States v. Fabrizio**, 385 U. S. 263 (1966). The government opposed Martin's petition on the grounds that the case was not of such public importance to justify deviation from normal appellate procedure and that **Fabrizio** did not concern the constitutional issue raised by Martin. The government did not urge that Congress has the power to prohibit all interstate transmission of wagers regardless of the lawfulness of the wager in the States where transmitted and received. Certiorari was denied. 385 U. S. 1008.

The Court of Appeals for the Fifth Circuit affirmed the judgments, holding that the power of Congress under the commerce clause "clearly extends to an absolute prohibition regardless of State public policy, **Champion v. Ames**, 1903, 188 U. S. 321 . . . [and Congress] also has

[2] The remaining counts were dismissed on motion by the government.

the power to prohibit all interstate transmission of wagers" (App. A, *infra*, p. A-8).

The Court of Appeals, assuming that the instant wagers were made in Nevada, indicated that the resolution of the question of whether Texas law was violated was not necessary for affirmance of the convictions in this case. The Court did state, however, that since the Texas statute prohibits "wagering by a 'person in this state'", the petitioners were guilty of an offense punishable by a fine of $5 to $100 under Texas law (App. B, *infra*, p. A-11). Among the reasons for its conclusion that Texas law was violated, the Court of Appeals stated that since petitioners did not contend that they came within the exception of Section 1084 (b) for transmission of "bets", they could not validly claim that Texas law was not violated (App. A, *infra*, p. A-5). The Court of Appeals subsequently deleted this reason given in its original opinion after it was brought to the Court's attention by petitioners' petition for rehearing that it had apparently misconstrued the provisions set forth in 18 U. S. C., § 1084 (b). Section 1084 (b) excepts transmission of **information** assisting in the placing of bets or wagers, but does not except transmission of **bets**. Petitioners had stipulated at trial that they transmitted **bets** and **information** and therefore could not argue that they came within the exception.

REASONS FOR GRANTING THE WRIT.

I.

Nevada's legislation and promotion of many forms of gambling is well known,[3] but in this case its policy is negated by the commerce power legislation (18 U. S. C., § 1084) passed under the rubric of "assisting" the states. Thus, the question presented is: "Whether Congress has

[3] (App. A, *infra*, p. A-4).

the power under the commerce clause to prohibit all interstate transmission of wagers, by means of non-governmental facilities, regardless of the lawfulness of the wager in the States where transmitted and received." The Court of Appeals held that the power of Congress under the Commerce clause "clearly extends to an absolute prohibition regardless of state public policy, **Champion v. Ames**, 1903, 188 U. S. 321 . . . [and Congress] also has the power to prohibit **all** interstate transmission of wagers." (App. A, *infra*, p. A-8). Therefore, this case presents for determination the important question of whether Congress has the absolute power to prohibit all interstate transmission of wagers regardless of lawfulness of the wager.

The statute under which petitioners were indicted and convicted, 18 U. S. C., § 1084, prohibits use of interstate commerce facilities for certain gambling transactions. Section 1084 forbids anyone in the business of betting and wagering from knowingly using a wire communication facility for interstate transmission of bets and wagers, or information assisting in the placing of bets and wagers. Section 1084 was "part of a single legislative 'package'" containing "a series of anti-gambling bills sponsored by the Department of Justice." See Brief for the United States, **United States v. Fabrizio**, 385 U. S. 263 (1966), pp. 11-12, 15 and n. 9. The motivation behind passage of 18 U. S. C., § 1084 was anti-gambling. Yet, the constitutional authority for the enactment of Section 1084 was the commerce clause, and the bill was justified by Congress as filling a professed need "to assist the various states and the District of Columbia in the enforcement of **their** laws pertaining to gambling, bookmaking and like offenses." See S. Rep. No. 588, 87th Cong., 1st Sess., p. 2; H. Rep. No. 967, 87th Cong., 1st Sess., p. 2 (emphasis added).

The reason for such justification by Congress of this legislative enactment seems clear. This Court had earlier up-

held commerce clause legislation affecting matters subject to the State police power when such laws aided the States by making it "impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce." **Clark Distilling Co. v. Western Md. R. Co.**, 242 U. S. 311, 331 (1917). **Clark** is central in the cases dealing with the importation and sale of liquor within the various states. These cases,[4] like the cases prohibiting the transportation of lottery tickets in interstate commerce, turn on the theory that federal legislation was necessary to prevent one state from "preying" on another through the facilities of interstate commerce (See Brief for United States, **United States v. Fabrizio**, p. 10).

In this case, the Court of Appeals held that Congress had "the power to prohibit **all** interstate transmission of wagers . . . regardless of state public policy . . ." (App. A, *infra*, p. A-8). Thus, the Court of Appeals decision is in conflict with this Court's holding in **United States v. Kahriger**, 345 U. S. 22 (1953) that there is a constitutional barrier against federal regulation of state gambling policy. In **Kahriger** a federal tax requiring the registration of people engaged in the gambling business was upheld because this Court found a legitimate revenue-collecting aim and result. But had the majority agreed with Mr. Justice Frankfurter and Mr. Justice Douglas that the major purpose of the tax was "to grapple directly with gambling in the states," 345 U. S. at 40, the measure would clearly have been struck down.[5] Mr. Justice Jackson, though concurring with the majority, noted that gambling is a local concern and "professional gambling continues to survive because a large and influential part

---

[4] See Leisy v. Hardin, 135 U. S. 100 (1890); **In re Rahrer**, 140 U. S. 545, 561 (1891); **Champion v. Ames**, 188 U. S. 321 (1903) (Lottery case).

[5] This Court recently reversed the majority opinion in **Kahriger**, but on Fifth Amendment grounds. **Marchetti v. United States**, 88 S. Ct. 697 (1968).

of our population patronizes and protects it." 345 U. S. at 35.

The constitutional argument here was also urged in **United States v. Frankfort Distilleries, Inc.**, 324 U. S. 293 (1945). In that case a Sherman Act conviction of producers and distributors who controlled liquor prices in Colorado was reversed by the Tenth Circuit because all the sales were within Colorado, and there was no basis for invocation of the federal legislation. Reversing the Court of Appeals, this Court held that the means used to control prices reached beyond the boundaries of Colorado, and that the scheme was dependent for its success upon activity affecting commerce. The defense argued, however, that the charged combinations were condoned by Colorado's fair trade laws. This Court specifically found that Colorado did not approve such activity and that this therefore was not a case in which the commerce power "is applied to defeat the policy of the State." "That", said the Court, "would raise questions of moment which need not be decided until they are presented". 324 U. S. at 299. This case squarely presents such issue. The constitutional validity of the use of the commerce power to defeat, rather than to assist, State policy lies at the heart of the instant case, and this Court should review this conviction so that a definitive ruling on this question may result.

II.

The Court of Appeals misconstrued Texas law when it stated that **petitioners** violated Texas law even though the wager was admittedly made in Nevada and petitioners were not within the borders of Texas. This misinterpretation of Texas law by the Court of Appeals caused that Court to consider the constitutional questions raised by petitioners in an improper light, to the prejudice of petitioners.

As stated, petitioners stipulated in the District Court that they were engaged in the business of betting and wagering in Las Vegas, Nevada, and that they accepted football wagers in Las Vegas **from** bettors who telephoned from Houston, Texas (R. 172). Nevada, where the wagers were made,[6] prohibits neither wagering on football games nor the dissemination of information assisting in such wagering. Texas does not bar wagers concluded out of the State of Texas, nor does it prohibit receipt or distribution of information assisting in placing of bets and wagers.[7]

Although holding that it made no difference whether Texas law was violated by petitioners, the Court of Appeals stated that the conduct of petitioners was an offense (punishable by a fine of $5 to $100) under Texas law even though the **wager was admittedly made in Nevada** and **petitioners were not within the borders of Texas** (App. B, *infra*, p. A-11).

The Texas Supreme Court recently upheld earlier decisions that Texas applies a different standard in determining the legality or illegality of conduct when a wager is placed outside the borders of Texas. **Alberto Castilleja v. Severa Camero**, 10 Tex. Sup. Ct. J. 340 (1967).

In **Castilleja**, the plaintiff and defendant's parents, who were residents of Texas, agreed to jointly purchase a lottery ticket in the Mexican National Lottery. This agreement was made within the borders of Texas. The defendant's parents bought the lottery ticket in Mexico,

---

[6] The Court of Appeals assumed as correct petitioners' contention that wagers are considered to be contracts and that the instant wagers "were made in Nevada, not Texas" (App. A, *infra*, pp. A-4-5).

[7] Title II, Texas Stat. Ann., Art. 646, provides:

"No person **in this state** shall enter into an agreement . . . whereby either one or both shall bet or wager money . . . upon . . . a game of baseball or football" (emphasis added).

and the ticket subsequently was declared the winning ticket. The defendant collected the money, but refused to pay plaintiff his share, contending that the transaction was illegal under a Texas statute forbidding the establishment or operation of a lottery or the sale of lottery tickets in Texas. The Texas Supreme Court upheld the lower Court's judgment in favor of the plaintiff, holding that the contract was not illegal under Texas law for the reason that the agreement was to do a lawful thing, *i. e.*, to participate in a Mexican lottery. 10 Tex. S. Ct. J. at 341. The Court reasoned that Texas law is concerned only with events taking place within its borders and when another sovereign is involved, a different standard is applied.

The Fifth Circuit has similarly held in **Jacob v. Hyman,** 5 Cir., 286 Fed. 346 (1923), that Texas law is concerned only with events taking place in Texas. **Jacob** involved the enforcement of claims arising from dealing in cotton futures. There, a Texas resident sent a telegram from Texas to the New Orleans, La. futures exchange. Under Texas law the contract involved was "a wagering contract, the enforcement of which was contrary to the public policy of the state of Texas, and invalid and unenforceable in the courts sitting in Texas." 286 Fed. at 348. The Fifth Circuit held, however, that the contract was legal in New Orleans and therefore was enforceable by a federal court sitting in Texas.

Here, the Court of Appeals did not refer to the **Castilleja** and **Jacob** cases in its original opinion, but upon petition for rehearing modified its opinion, holding that the two decisions were inapplicable. The Court stated that neither case involved conduct which was illegal under Texas law, and that here, petitioners' conduct was clearly unlawful (App. B, *infra,* p. A-11).

Jacob and **Castilleja** strongly support petitioners' contention that Texas does not bar wagers concluded out

of the state, nor does it prohibit receipt or distribution of information assisting in the placing of bets and wagers. Thus, here, gambling activity endorsed by one State (Nevada) and only incidentally connected with another State (Texas), which does not itself prohibit the activity, is transformed into a federal felony punishable by imprisonment and heavy fines.[8]

As stated, Section 1084 was enacted "to assist the various states . . . in the enforcement of **their** laws pertaining to gambling, bookmaking and like offenses" (See p. 6, *supra*). In this circumstance, application of the federal statute to supersede the policy of one State (Nevada) without assisting the law enforcement of another State (Texas) is of doubtful constitutionality. **Clark Distilling Co. v. Western Md. Rd. Co.**, 242 U. S. 311, 331; **United States v. Frankfort Distilleries, Inc.**, 324 U. S. 293. Congress lacks the constitutional power to subordinate Nevada's basic economic and moral policy to what is at most a marginal concern to Texas.

In addition, if the decision by the Court of Appeals means that the application of Section 1084 depends upon whether Texas law was violated and that Section 1084 would not otherwise apply, then the federal statute remains unconstitutional. The reason is that the statute exhibits an intent to prohibit and to punish violations of State law, thereupon invading the police power, inherent in the states. **United States v. Constantine**, 296 U. S. 287, affirming 75 F. 2d 928 (5 Cir.).

In **Constantine**, a federal statute imposed a special excise tax of $1,000.00 on persons carrying on liquor

[8] Assuming that the Court of Appeals was right in stating that petitioners violated Texas law, said offense is punishable only by a fine of $5 to $100 under Texas law. Thus, the lightness of the penalty and the decisions in **Castilleja** and **Jacob** indicate how marginal Texas' concern is with a situation such as here presented.

business contrary to the laws of his state. This Court, affirming the Fifth Circuit Court's decision, held that the validity of the Statute should be decided on the following grounds:

"The question is whether the exaction of $1,000.00 in addition, by reason solely of his violation of State law, is a tax or a penalty." 296 U. S. at 294.

This Court held that the exaction of $1,000.00 was a penalty and therefore "beyond the limits of federal power." 296 U. S. at 294.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

MORRIS A. SHENKER,

JOHN L. BOEGER,
408 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioner,
Maurice Daniel Dodson.

EDWARD BENNETT WILLIAMS,

ROBERT L. WEINBERG,
1000 Hill Building,
Washington, D. C. 20006,
Attorneys for Petitioner,
Robert Lynn Martin.

APPENDIX.